SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 394

ROBERTA WELLS, AS ADMINISTRATRIX OF THE ESTATE OF CHEEK WELLS,

Petitioner,

vs.

SIMONDS ABRASIVE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD DISTRICT

REPLY BRIEF FOR PETITIONER

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CITATIONS

Cases:

Statutes and Rules:

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The crucial fallacy of Respondent's argument is the assumption that the question in this case is: Which of two Pennsylvania statutes most nearly resembles the Alabama statute on which this action is based? This was substantially the first question in the petition for certiorari, which, however, this Court declined to review, granting the writ solely on the second question: Whether, irrespective of the correctness or incorrectness of the application of Pennsylvania law by the Court below, its decision resulted in a violation of the Full Faith and Credit Clause. Here the basic question is whether a two-year limitation period of

the Alabama statute, in an action by a personal representative for the instant death of his decedent, is so obnoxious to the public policy of Pennsylvania that full faith and credit need not be given to it in a suit in the District Court in Pennsylvania by an Alabama administrator.

As conclusive of the absence of such an antagonistic public policy, Petitioner points to Section 35(b) of the Pennsylvania Act of 1937 which authorizes an action to be commenced and prosecuted by the personal representative of one killed by wrongful act in Pennsylvania and which, as held by the Supreme Court of Pennsylvania, is subject to a two-year limitation period. This, as in *Hughes* v. *Fetter*, 341 U. S. 609, 612 (1951), shows that Pennsylvania "has no real feeling of antagonism against [two-year limitations in] wrongful death suits * * *."

Respondent now seeks to impose on the Court the task of delving into the very perplexing confusion in the Pennsylvania wrongful death decisions which, by refusing to consider Petitioner's first point, the Court avoided. Respondent materially adds to this confusion by quoting on page 5 of its brief the leading case in Alabama of *Parker* v. *Fies and Sons*, 243 Ala. 348, holding that the only recovery in Alabama for wrongful death is under the Homicide Act and that the Alabama Survival Statute has no application to a wrongful act causing death. Far from aiding Respondent's case the quotation from the Alabama case points up the fact that the reverse is true in Pennsylvania. It was specifically held in *Murray* v. *P. T. Co.*, 359 Pa. 69; 58 A. (2) 323 (1948), contrary to the interpretation placed by Alabama on its survival statute, that the so-called Pennsylvania "Survival" Act of 1937 does apply to a wrongful act causing death, and in fact provides a complete remedy therefor.

It is evident from the quotations from Pennsylvania decisions found in Respondent's brief that there is consid-

erable confusion arising out of the language used by the Pennsylvania Supreme Court. It is believed that much of the confusion is due to the fact that the so-called Survival Statute in Pennsylvania[1] contains two sections, 35(a) and 35(b). Section 35(a), which was a part of the Fiduciaries Act of 1917, provides that no suit brought by the decedent during his life shall abate by reason of his death, but that the personal representative may be substituted as plaintiff. This is properly designated a Survival Statute, since under it the *suit* brought by the injured man survives his death. Section 35(b) (which by an amendment to the Fiduciaries Act of 1917 became effective in 1937 and hence is known as the Act of 1937) provides that an executor shall have power to "*commence and prosecute* . . . all personal actions which the deceased might have commenced and prosecuted." It is this Section 35(b) which has been construed by the Pennsylvania Supreme Court as applicable to causes of action for death by wrongful act and as subject to the two-year limitation period.[1] This provision applies to cases where no suit has been brought by the decedent. Under it, as under all Wrongful Death Statutes, the *cause of action* to the personal representative based on the negligent killing is not ended by, and, in that sense, survives his death. *Fisher* v. *Hill*, 368 Pa. 53; 81 A. (2) 860 (1951).

Respondent, who fails to meet the real issue in this case, nowhere suggests any ground for a different limitation policy in Pennsylvania in actions by a personal representative under the Alabama statute from those which would apply to an action by the personal representative under

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[1] *Stegner* v. *Fenton*, 351 Pa. 292, 40 A (2) 473 (1945).

A large part of the confusion in the Pennsylvania decisions is believed due to the fact that this Section 35(b) was ineffective prior to 1937, so that until then the only statute providing damages for death by wrongful act was the Act of 1855, which contains a one-year limitation.

Section 35(b) of the Pennsylvania Act of 1937. Certainly none of the circumstances stated on pages 4 to 7 of Respondent's brief point to any different public policy under these two Acts.

The real question in the present case in no way depends on what the different Pennsylvania statutes have been *called*, but on what they *provide*. Nor does it matter which one most nearly resembles the Alabama statute on which this suit is based. There is no Pennsylvania statute which is identical with that of Alabama. The Act of 1855 on which Respondent relies is unlike the Alabama statute, providing, as it does, for suits by the husband or widow, whereas the Alabama Act provides for a suit by the personal representative, as does Section 35(b) of the Pennsylvania Act f 1937. The Alabama statute differs from both Pennsylvania Acts in providing for punitive damages. The present suit is brought under the Alabama Act and the Pennsylvania statutes are relevant, not as specifically providing the limitation period applicable to this case, but merely as indicative of whether there exists in Pennsylvania a public policy antagonistic or obnoxious to that of Alabama permitting a two-year period for bringing suits of this nature.

Respondent repeatedly denies, with very positive although unjustified assurance, the correctness of Petitioner's statement that the Act of 1937 provides a *complete remedy* for death by wrongful act. The accuracy of Petitioner's Statement is fully sustained by *Murray* v. *P. T. Co.*, 359 Pa. 69, 58 A. (2) 323, which was decided in 1948 after rehearing and recall of the original opinion, and which modified, either specifically or in effect, statements made in a number of the Court's previous decisions,[2] which

[2] Including *Pezzulli* v. *D'Ambrosia*, 344 Pa. 643, 26 A. (2) 659 (1942); *Piacquadio* v. *Beaver Valley Service Co.*, 355 Pa. 183, 49 A. (2) 406 (1946), and *Stegner* v. *Fenton*, 351 Pa. 292, 40 A. (2) 473 (1945).

statements are now extensively quoted and relied on by Respondent. The *Murray* case, supplemented by the later decision in *Fisher* v. *Hill*, 368 Pa. 53, 81 A. (2d) 860 (1951), holds squarely:

1. That the common law rule denying the right to sue for wrongful death was superseded in Pennsylvania by three statutory provisions:

> (a) Section 35(a) of the Fiduciaries Act of 1917 permitting the personal representatives to be substituted for a decedent who had brought suit before his death;[3]
>
> (b) Section 35(b) of the Fiduciaries Act, (known as the Act of 1937) providing for a suit by the personal representative of one who had not so brought suit; for the gross amount which decedent would have earned during his probable lifetime, had he lived, less his probable living expenses, reduced to present worth;
>
> (c) the Act of 1855 providing for a suit by the widow, husband, children or parents, under which they are entitled to such amount as the decedent would have given them *out of his earnings*, had he lived.

2. That the remedies under (b) and (c) above are required by Pennsylvania Rule of Civil Procedure No. 2202 to be consolidated in one action in order to recover under both.

3. That when the surviving relatives do not bring an action under the Act of 1855, nevertheless the entire amount recoverable for the wrongful death may be included in the verdict under Section 35(b) of the Act of 1937.

4. That where both remedies are pursued in the same suit, the jury, in order to avoid the duplication of damages,

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[3] Section 35(a) is the only true Survival Act. Although Section 35(b) (the Act of 1937) is also referred to as a Survival Act, the only thing that survives thereunder is the *Cause of action*, which survives under all wrongful death acts. The *Murray* case established that the right of recovery is not the same as under Section 35(a).

must fix the maximum amount of the damages recoverable under Section 35(b) of the Act of 1937; fix also that recoverable under the Act of 1855 (which goes to the widow, etc.); and deduct this from the amount receivable by the personal representatives.

It is therefore perfectly clear that the full remedy for wrongful death is provided under the Act of 1937; that the *entire amount* recoverable under both Acts may be recovered under the Act of 1937 alone; and that the only effect of the 1855 Act is to permit certain surviving relatives to obtain a portion of this amount, without administration and free of Pennsylvania inheritance tax and the claims of creditors.

* * * * * * *

Respondent in its brief at page 13 argues that the early case of *McElmoyle* v. *Cohen*, 13 Pet. 312 (1839), and like cases, establish the rule that the statute of limitations of the forum always governs, even though the limitation of the state where the cause of action arose is longer. While those cases may establish that a state may under appropriate circumstances have a valid policy with respect to the time within which suit on a foreign cause of action must be brought, provided such policy denies no substantive rights granted by the law creating the cause of action, they certainly do not establish the automatic rule contended for by Respondent. In fact, in *Order of Travelers* v. *Wolfe*, 331 U. S. 586 (1947), where it was held that South Dakota could not apply its statute of limitations to an Ohio cause of action which carried with it a shorter limitation, the majority said at page 627 that in their opinion this decision in effect overruled *McElmoyle* v. *Cohen*. Actually, the majority reached its decision by applying to the problem the usual principles underlying the cases involving full faith and credit and examining whether South Dakota

had a basically antagonistic policy, founded on a sufficient local interest, against the Ohio limitation.[4] It is not our view, therefore, that it is necessary, in order to decide the case at Bar in favor of Petitioner, for this Court to overrule *McElmoyle* v. *Cohen*, since it is clearly distinguishable both on the ground that the Alabama statute does not pertain to the remedy but to the "substantive cause of action"; and also that Section 35(b) of the Pennsylvania Act of 1937 demonstrates beyond question that Pennsylvania public policy with regard to the limitation period in actions for wrongful death is not basically antagonistic to that of Alabama.

Respondent discusses several diversity cases which hold generally that the federal courts must follow the laws of the states in which they sit. Those cases, of course, are not controlling where, as here, a constitutional right is infringed. Moreover, those cases in fact represent an attempt by this Court in recent years to assure that the substantive rights of parties in federal suits are determined in accordance with the law creating the cause of action. As stated in *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239 (1942) at page 245:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates."

In that case, as in *Engel* v. *Davenport*, 271 U. S. 33 (1926), the Court held that a state court having concurrent jurisdiction with the federal courts in enforcing a right created by federal law, must apply certain federal rules despite the fact that such rules may have traditionally been denomi-

[4] For examples of earlier cases in which this Court indicated that statutes of limitation of the forum must meet the test of the Full Faith and Credit Clause, see *Christmas* v. *Russell*, 5 Wall. 290 (1866); *Roche* v. *McDonald*, 275 U. S. 449 (1928).

nated "procedural," and expressly stated that the same philosophy was the basis of the *Erie* v. *Tompkins* line of cases. To the extent, therefore, that such cases have any importance here they work for the proposition that the result in the present action should be no different than if brought in the courts of the State creating the cause of action, i.e., Alabama.

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Only one other point in Respondent's brief need be noted. In its Summary of the Argument, it for the first time in this litigation emphasizes the phrase "*and not elsewhere*" relative to the Alabama authorization of a suit for wrongful death to be brought within the State of Alabama. On pages 20-21 of its brief it argues that the above phrase precludes any action based on the Alabama statute in the courts of Pennsylvania. No such contention was made by it in the District Court, in the Circuit Court of Appeals or in the brief in this Court in opposition to the petition for certiorari. Doubtless, the reason for this was that the question had been decided specifically by this Court against Respondent's contention in *Tennessee Coal, Iron & Railroad Company* v. *George*, 233 U. S. 354 (1914), where the Court, construing another Alabama statute, said.

> "The record raises the single question as to whether the full faith and credit clause of the Constitution prohibited the courts of Georgia from enforcing a cause of action given by the Alabama Code, to the servant against the master, for injuries occasioned by defective machinery, when another section of the same Code provided that suits to enforce such liability 'must be brought in a court of competent jurisdiction within the State of Alabama *and not elsewhere*.'" (pp. 358-359) . . . But the owner of the defective machinery causing the injury may have removed from the State and it would be a deprivation of a fixed right if the

plaintiff could not sue the defendant in Alabama because he had left the State nor sue him where the defendant or his property could be found because the statute did not permit a suit elsewhere than in Alabama. The injured plaintiff may likewise have moved from Alabama and for that, or other, reason may have found it to his interest to bring suit by attachment or *in personam* in a State other than where the injury was inflicted.

"The courts of the sister State trying the case would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depend. But venue is no part of the right: and a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action." (pp. 359-360).

Respectfully submitted,

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